IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

WRIGHT TRANSPORTATION, INC., an Alabama corporation, individually and on behalf of all others similarly situated, Plaintiff, v. PILOT CORPORATION; PILOT TRAVEL CENTERS LLC, d/b/a PILOT FLYING J; JAMES A. HASLAM; JOHN FREEMAN; BRIAN MOSHER and MARK HAZELWOOD, Defendants.	Case No. 1:13-cv-00352

PILOT CORPORATION AND PILOT TRAVEL CENTERS LLC'S MEMORANDUM IN SUPPORT OF THEIR MOTION TO DISMISS

Defendants Pilot Corporation ("Pilot Corp.") and Pilot Travel Centers LLC, d/b/a Pilot Flying J ("Pilot"), submit this memorandum in support of their Motion to Dismiss the Class Action Complaint (the "Complaint") of Plaintiff Wright Transportation, Inc., pursuant to Rules 9(b) and 12(b)(6) of the Federal Rules of Civil Procedure.

PRELIMINARY STATEMENT

In this purported class action, Plaintiff brings claims against Pilot Corp. and Pilot, along with several of Pilot's current or former employees[1] (collectively, "Defendants"), related to an alleged scheme to withhold rebates and/or discounts owed to Plaintiff related to its purchases of diesel fuel from Pilot. In support of its allegations, Plaintiff relies almost exclusively on an FBI affidavit (discussed below) that makes no mention of Plaintiff and provides no basis to suggest that Plaintiff was a target of any alleged scheme to withhold rebates or discounts it was actually owed. Plaintiff ultimately attempts to inflate what is a simple (and baseless) breach of contract action by asserting claims under the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1962(c), as well as asserting claims for fraudulent misrepresentation, negligent misrepresentation, suppression, deceptive trade practices, and unjust enrichment. Plaintiff's claims are legally deficient and should be dismissed.

First, Plaintiff fails adequately to state a RICO claim. As a threshold matter, Plaintiff's RICO claims are merely dressed-up breach of contract or fraud claims and do not state an independent cause of action. Moreover, Plaintiff's RICO

[1] These current and former employees include James A. Haslam, John Freeman, Brian Mosher, and Mark Hazelwood (the "Individual Defendants").

claims are based solely on the allegations contained in the FBI affidavit, which makes no mention of Plaintiff, and Plaintiff fails to include sufficient factual allegations to satisfy the particularized pleading standard required by Rule 9(b). Plaintiff's RICO claims also fail because the Complaint does not adequately allege the existence of a RICO enterprise or the requisite degree of control under 18 U.S.C. § 1962(c). The Complaint likewise fails to adequately plead proximate causation of Plaintiff's (unidentified) RICO injury. See infra Part I.A.

Second, Plaintiff's fraud claims are deficient because Plaintiff fails to plead with specificity the "who, what, where, and when" of the alleged fraud as required by Rule 9(b). Plaintiff's bare reliance on the allegations of the FBI Affidavit is simply insufficient to satisfy the heightened pleading standard under Rule 9(b). See infra Part I.B.

Third, Plaintiff fails to state a claim for fraudulent suppression because it did not (and cannot) allege that Pilot owed any duty to Plaintiff outside of the parties' alleged contractual obligations. See infra Part I.C.

Fourth, Plaintiff does not state a claim for negligent misrepresentation because it does not allege that Defendants owed it any non-contractual duty and also fails to plead the other elements of negligent misrepresentation with the requisite particularity. See infra Part I.D.

Fifth, Plaintiff has not adequately stated a breach of contract claim because it does not identify any specific terms of the alleged (but unidentified) contract that Pilot allegedly breached. See infra Part I.E.

Sixth, Plaintiff's claims under the various states' deceptive trade practices statutes are also deficient. As an initial matter, because Plaintiff resides in Alabama and does not allege any relevant conduct that occurred outside Alabama, Plaintiff does not have standing to assert a claim under any of the state deceptive trade practices statutes from outside Alabama. With respect to the Alabama Deceptive Trade Practices statute (Ala. Code § 8-19-5), Plaintiff failed to satisfy the pre-litigation notice requirements under the statute. Plaintiff also lacks standing as a consumer under the Alabama statute and its claim is also barred by Plaintiff's fraud claims. See infra Part I.F

Seventh, Plaintiff claim for unjust enrichment is barred because Plaintiff alleges a written contract and therefore has an adequate remedy at law. See infra Part I.G

Eighth, while the issue of Plaintiff's adequacy as a putative class representative is not before this Court, it is clear that Plaintiff cannot seek any relief on behalf of a purported class when Plaintiff does not have any viable claims of its own. In any event, the putative class alleged in the Complaint will be barred

and fully extinguished after approval of the nationwide class settlement that is pending before the United States District Court for the Eastern District of Arkansas. See infra Part II.

BACKGROUND

Pilot is the nation's largest seller of over-the-road diesel fuel which operates a chain of truck stops around the country. The Complaint stems from an investigation by the FBI into Pilot's diesel fuel discount and rebate program. On April 18, the United States District Court for the Eastern District of Tennessee unsealed a 120-page affidavit in support of a search warrant application (the "FBI Affidavit," attached as Exhibit A to the Complaint). The FBI Affidavit alleged a purported scheme in which certain Pilot employees allegedly withheld rebates and discounts owed to certain customers. Numerous civil lawsuits have been filed in multiple jurisdictions based on the allegations in the FBI Affidavit (the "Pilot Actions"). The present Complaint was filed on July 10, 2013.

Shortly after the Complaint was filed, Defendants reached a nationwide class settlement with a group of plaintiffs in the Pilot Actions, which is pending before Judge James A. Moody of the United States District Court for the Eastern District of Arkansas (the "Global Settlement"). The Global Settlement, which was

preliminarily approved by Judge Moody on July 16, 2013,[2] resolves, on a nationwide class basis, all claims and causes of action arising out of Pilot's alleged failure to provide diesel fuel price rebates or discounts to Pilot Flying J customers.[3] The fairness hearing on the Global Settlement is scheduled for November 25, 2013 (the "Fairness Hearing"). The deadline for any objections to the Global Settlement was October 15, 2013, and to date there have been no objections filed challenging the Global Settlement. On or about October 11, 2013, Plaintiff opted out of the Global Settlement.

ARGUMENT

I. THE COMPLAINT FAILS TO STATE A CLAIM

Under Federal Rule of Civil Procedure 12(b)(6), "a claim may be dismissed when a plaintiff fails to allege any set of facts in support of his claim which would entitle him to relief." Magluta v. Samples, 256 F.3d 1282, 1284 (11th Cir. 2001). It is well established that only well-pled factual allegations will be accepted as

[2] The Global Settlement was revised on July 23, 2013, to enlarge the settlement class period to being on January 1, 2005. The amended Global Settlement was approved by Judge Moody on July 24, 2013.

[3] Specifically, the Global Settlement creates a process whereby an independent auditor will review and verify any discrepancy between the rebates or discounts owed to any Pilot customer and the rebates or discounts actually paid to that customer. If a covered customer's account is found to have a discrepancy, that customer will receive 100% of any amount owed to it, plus 6% interest and class attorneys' fees.

true; conclusory allegations and legal conclusions are insufficient to defeat a motion to dismiss. Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009); see also Watts v. Florida Int'l Univ., 495 F.3d 1289, 1295 (11th Cir. 2007). Additionally, the Court should not accept unsupported inferences or "unwarranted deductions of fact." Aldana v. Del Monte Fresh Produce, N.A., Inc., 416 F.3d 1242, 1248 (11th Cir. 2005); see also, Bell Atlantic Corp. v. Twombly 550 U.S. 544, 570 (2007) (plaintiff must allege "enough facts to state a claim to relief that is plausible on its face").

A. Plaintiff Fails To Adequately Allege A RICO Claim

To state a RICO claim, Plaintiff must allege facts demonstrating: (i) conduct (ii) of an enterprise (iii) through a pattern (iv) of racketeering activity by Defendants. 18 U.S.C. § 1962(c); Lehman v. Lucom, 727 F.3d 1326, 1330 (11th Cir. 2013); Dysart v. BankTrust, 516 F. App'x. 861, 863 (11th Cir. 2013). To satisfy RICO's standing requirements, a plaintiff must also demonstrate "(1) a violation of section 1962; (2) injury to business or property; and (3) causation of the injury by the violation." 18 U.S.C. § 1964(c); Dysart, 516 F. App'x at 863.

RICO is a disfavored and often abused statute, and courts accordingly seek to eliminate unmeritorious RICO claims at an early stage. See DePaola v. Nissan N. Am., Inc., No. 1:04-cv-267, 2006 WL 1181131, at *12 (M.D. Ala. May 2, 2006)

(RICO claims "must be subjected to scrutiny due to their potential for abuse by civil litigants"); Kirk v. Heppt, 423 F. Supp. 2d 147, 150 (S.D.N.Y. 2006) ("Courts should strive to flush out frivolous RICO allegations at an early stage of the litigation"); see also Miranda v. Ponce Fed. Bank, 948 F.2d 41, 44 (1st Cir. 1991) (describing civil RICO as "an unusually potent weapon—the litigation equivalent of a thermonuclear device" and emphasizing that "it would be unjust if a RICO plaintiff could defeat a motion to dismiss simply by asserting an inequity attributable to a defendant's conduct and tacking on the self-serving conclusion that the conduct amounted to racketeering"). As one court has noted, "[c]ourts must always be on the lookout for the putative RICO case that is really nothing more than an ordinary fraud case clothed in the Emperor's trendy garb." In re SmithKline Beecham Clinical Labs. Inc., 108 F. Supp. 2d 84, 93 (D. Conn. 1999); see also Goldfine v. Sichenzia, 118 F. Supp. 2d 392, 394, 405 (S.D.N.Y. 2000) (courts should not permit a plaintiff to "dress a common law breach of contract . . . claim as a RICO claim"). The RICO statute does not create a federal breach of contract claim with treble damages. See Harrell v. Primedia, Inc., No. 02-cv-2893, 2003 WL 21804840, at *1 (S.D.N.Y. Aug. 6, 2003) (criticizing "another instance of counsel taking a straightforward breach of contract case and through tortured pleading attempting to turn it into a RICO claim").

1. Plaintiff's RICO Claim Fails Because It Merely Alleges A Breach Of Contract

Courts routinely dismiss attempts to convert ordinary breach of contract claims into fraud claims, especially RICO claims. See, e.g., Homes by Michelle, Inc. v. Fed. Savs. Bank, 733 F. Supp. 1495, 1501 (N.D. Ga. 1990) (dismissing plaintiff's RICO claims because "they merely restate and/or extrapolate from their breach of contract and fraud claims…"); Bachrach v. Keaty, No. 88 Civ. 0797, 1991 WL 60353, at *4 (S.D.N.Y. Apr. 10, 1991) (dismissing RICO claim because "[w]hile the claim is carefully drafted to conform to standard RICO phraseology, there is nothing to elevate the underlying dispute above a mere breach of contract claim."). Here, Plaintiff alleges mail and wire fraud as the predicate acts underlying its RICO claims, and such fraud claims are predicated on the alleged failure to comply with the (unidentified) terms of Plaintiff's alleged contract with Pilot. (Complaint at ¶¶ 57-70) Plaintiff's conclusory allegation that Defendants failed to provide Plaintiff with rebates and discounts in accordance with Plaintiff's alleged contractual rights is insufficient to state a RICO claim. See, e.g., Homes by Michelle, Inc., 733 F. Supp. at 1501 (dismissing RICO claim that merely derived from a breach of contract). Plaintiff cannot identify any duty outside the alleged contractual relationship between Plaintiff and Pilot, so it cannot state a

RICO violation. Id.

2. Plaintiff Fails To Plead The RICO Claims With Particularity

Plaintiff asserts mail and wire fraud in violation of 18 U.S.C. §§ 1341 and 1343 as the alleged predicate acts in support of its RICO claim. (Complaint at ¶ 60) To plead a RICO claim based on mail or wire fraud, Plaintiff must show (i) intentional participation in a scheme to defraud, and, (ii) the use of the interstate mails or wires in furtherance of that scheme. United States v. Maxwell, 579 F.3d 1282, 1299 (11th Cir. 2009). Plaintiff must also allege a specific intent to deceive. Club Car, Inc. v. Club Car (Quebec) Import, Inc., 362 F.3d 775, 783 (11th Cir. 2004). Plaintiff must also plead its mail and wire fraud claims pursuant to Rule 9(b)'s particularity standard, including pleading the "contents of the communications, who was involved, where and when they took place, and explain why and how they were fraudulent." Barnett v. Blane, No. 11-14345-civ., 2013 WL 1001963 (S.D. Fla. Mar. 13, 2013); Douglas Asphalt Co. v. QORE, Inc., 657 F.3d 1146 (11th Cir. 2011) (RICO claims subject to 9(b) pleading standards).[4] Failure to plead RICO allegations with sufficient particularity mandates dismissal

[4] The particularity requirement is significant in RICO cases because "the opportunity for an award of treble damages…might serve as significant *in terrorem* settlement leverage." Celpaco, Inc. v. MD Papierfabriken, 686 F. Supp. 983, 989 (D. Conn. 1988); see also Nasik Breeding & Research Farm Ltd. v. Merck & Co., 165 F. Supp. 2d 514, 537 (S.D.N.Y. 2001) ("policies behind Rule 9(b)'s particularity requirement apply with particular force in RICO actions.").

of the claim. Am. Dental Ass'n v. Cigna Corp., 605 F.3d 1283, 1293 (11th Cir. 2010) (dismissing RICO claim for failure to plead under Rule 9(b) "a pattern of racketeering activity predicated on a scheme to commit acts of mail and wire fraud"); see also Solomon v. Blue Cross & Blue Shield Ass'n, 574 F. Supp. 2d 1288, 1293 (S.D. Fla. 2008).

Here, Plaintiff's allegations of mail and wire fraud do not satisfy the particularity requirements of Rule 9(b) because they fail to state: (i) the content of any specific fraudulent misrepresentation or omission; (ii) who was involved in the alleged fraudulent communications; (iii) where and when they took place; (iv) why they were fraudulent; and (v) reliance. Additionally, the Complaint does not allege that Defendants contemplated some actual harm or injury to the Plaintiff here as required to allege specific intent. Spoto v. Herkimer Cnty. Trust, No. 99-CV-1476, 2000 WL 533293, at *5 (N.D.N.Y. Apr. 27, 2000).

Indeed, the Complaint does not make any specific allegations regarding the alleged mail and wire fraud. Instead, Plaintiff relies solely on the FBI Affidavit and conclusory statements that simply mimic the statutory language of RICO. As noted above, the FBI Affidavit makes no mention of Plaintiff, and the Complaint does not otherwise allege any RICO conduct specifically targeting Plaintiff.

For example, the Complaint is devoid of any specific allegations describing the rebate or discount that Plaintiff was purportedly supposed to get from Pilot, the form of communication that informed Plaintiff of its discount or rebate, the person who made such a representation to Plaintiff,[5] or the manner in which Plaintiff was misled. Similarly, the Complaint also fails to "discuss the nature of each defendant's participation in the [RICO] scheme," as Rule 9(b) requires. Ambrosia Coal & Constr. Co. v. Morales, 482 F.3d 1309, 1317 n. 12; see also Brooks v. Blue Cross and Blue Shield of Fla., Inc., 116 F.3d 1364, 1380–81 (11th Cir. 1997) ("[I]n a case involving multiple defendants…the complaint should inform each defendant of the nature of his alleged participation in the fraud."). Thus, Plaintiff's RICO claims are facially deficient.

3. The Complaint Fails To Adequately Plead Existence Of A RICO Enterprise

The Complaint also fails adequately to allege the existence of a valid "enterprise," a prerequisite to state a RICO claim. 18 U.S.C. § 1962(c). RICO defines "enterprise" as "any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although

[5] Plaintiff does allege that "[t]he fuel rebate agreement and/or discount was reached with Pilot employee Kevin Hanscomb" (Complaint at 23), but fails to provide any details regarding the alleged "fuel rebate agreement and/or discount," much less identify any terms of any agreement that were allegedly breached or specifically allege any material misrepresentation regarding any rebate or discount.

not a legal entity." 18 U.S.C. § 1961(4). However, the Complaint "must name a RICO person separate and distinct from the RICO enterprise." United States v. Goldin Indus., Inc., 219 F.3d 1268, 1271 (11th Cir. 2000).[6] Based on the allegations of the Complaint, Plaintiff has not, and cannot, do so.

Here, Plaintiff alleges that the RICO "enterprise" is Pilot.[7] (See, e.g., Complaint at ¶¶ 58, 65) However, as the Complaint makes clear, the Individual Defendants and Pilot Corp. are not "separate and distinct" from Pilot. See Danny Lynn Elec. & Plumbing, LLC v. Veolia Es Solid Waste Se., Inc., No. 2:09-cv-192, 2011 WL 2893629, at *2 (M.D. Ala. July 19, 2011) (dismissing RICO enterprise consisting of "parent companies and their subsidiaries, along with officers and agents of those corporations" because they were not separate and distinct). Instead, as in Danny Lynn, the Individual Defendants and Pilot Corp. "are associated only by virtue of their positions at [Pilot]" and what brings them together "is not their common purpose to commit fraud, but their common

[6] Kelly v. Palmer, Reifler & Assocs., P.A., 681 F. Supp. 2d 1356, 1378 (S.D. Fla. 2009) ("[T]o establish a valid enterprise to sustain RICO liability, [a plaintiff] must prove that each party to the enterprise is separate and distinct from the other"); Smart Science Lab., Inc. v. Promotional Mktg. Servs., Inc., No. 8:07-cv-1554, 2008 WL 2790219, at *6 (M.D. Fla. July 18, 2008) (dismissing a RICO claim for failing to allege a distinct RICO entity); Fuller v. Home Depot Servs., LLC, 512 F. Supp. 2d 1289, 1295 (N.D. Ga. 2007) (same).

[7] According to the Complaint, the RICO defendants are Pilot Corp. and the Individual Defendants. (Complaint at ¶¶ 59-70)

employment." Id. at *4. Similarly, Plaintiff has not alleged "any facts on the part of any of the defendants that fall outside the normal business of [Pilot]." Id. at *3. RICO liability depends on showing that "the defendants conducted or participated in the conduct of the '*enterprise's affairs*,' not just their *own* affairs." Reves v. Ernst & Young, 507 U.S. 170, 185 (1993) (emphasis in original).

4. The Complaint Fails To Allege That The RICO Defendants Controlled The RICO Enterprise

Plaintiff also fails to sufficiently allege that Defendants "conduct[ed] or participate[d]…directly or indirectly, in the conduct of" the alleged enterprise. See 18 U.S.C. § 1962(c). To "conduct or participate" in the affairs of an enterprise, a defendant "must participate in the operation or management of the enterprise itself." Reves, 507 U.S. at 185. Thus, Plaintiff must allege facts that show that a RICO defendant "ha[d] some part in directing the enterprise's affairs." Id. at 179 (emphasis added). An enterprise is "'operated' or 'managed' by others 'associated with' the enterprise who exert control over it." Id. at 184 (emphasis added). The operation and management test "is a very difficult test to satisfy." Amsterdam Tobacco Inc. v. Philip Morris Inc., 107 F. Supp. 2d 210, 216 (S.D.N.Y. 2000); Dahlgren v. First Nat'l Bank of Holdrege, 533 F.3d 681, 690 (8th Cir. 2008) (operation and management test is "stringent").

Here, Plaintiff does nothing more than recite the "control" language of the statute without actually providing any facts to suggest that the RICO defendants had any role in the control of the alleged RICO enterprise, much less that they directed any misconduct specifically at Plaintiff. (Complaint at ¶¶ 26-29) This is patently deficient under the heightened pleading standards of Rule 9(b). Bryant v. Citigroup, 512 F. App'x 994, 995 (11th Cir. 2013); Advocacy Org. for Patients & Providers v. Auto Club Ins. Ass'n, 176 F.3d 315, 329 (6th Cir. 1999).

5. The Complaint Fails To Plead Causation Under § 1964(c)

Plaintiff must also adequately allege, in addition to the elements of § 1962(c), that it suffered "(1) the requisite injury to 'business or property,' and (2) that such injury was 'by reason of' the substantive RICO violation." Williams v. Mohawk Indus., 465 F.3d 1277, 1283 (11th Cir. 2006). It is well-settled under § 1964(c) that "the plaintiff is required to show that a RICO predicate offense not only was a 'but for' cause of his injury, but was the proximate cause as well." Hemi Grp., LLC v. New York, 130 S. Ct. 983, 989 (2010).

"The Eleventh Circuit has emphasized that, for any plaintiff bringing a § 1964(c) cause of action, evidence of injury is an essential element of its RICO claim." Abrams v. Ciba Specialty Chems. Corp., 663 F. Supp. 2d 1220, 1239-40 (S.D. Ala. 2009) (citing Boca Raton Cmty. Hosp., Inc. v. Tenet Health Care Corp.,

582 F.3d 1227, 1234 (11th Cir. 2009)); 18 U.S.C. § 1964(c) (providing standing to bring a civil RICO action to "any person injured in his business or property by reason of a violation of section 1962"). Put another way, Plaintiff must show that it was a target of the alleged RICO fraud. Id.; see also Bivens Gardens Office Bldg., Inc. v. Barnett Banks of Fla., Inc., 140 F.3d 898, 907 (11th Cir. 1998) ("[Plaintiff] has RICO standing if the racketeering act that forms the basis of the RICO claim was directed at the [plaintiff]."); Abrahams v. Young & Rubicam Inc., 79 F.3d 234, 238 (2nd Cir. 1996) ("[Plaintiff's] failure to establish a RICO claim stems from the fact that he was not the 'target of the racketeering enterprise.'").

Here, Plaintiff fails to plead with any particularity that it was the target of Pilot's alleged scheme, or that the alleged scheme was the proximate cause of any injury it sustained. While Plaintiff references the FBI Affidavit, that affidavit never mentions Plaintiff or any misconduct specifically directed at Plaintiff. Similarly, Plaintiff fails to allege with specificity any cognizable injury or damages that resulted from any racketeering enterprise. Plaintiff merely makes a conclusory assertion that it was injured by way of "reduced fuel rebates and/or discounts, business destruction, lost profits and/or lost business opportunities," (Complaint at ¶ 70), which is wholly insufficient to state a particularized claim under § 1964(c). Among other deficiencies, Plaintiff does not identify the terms of any rebate or

discount agreement it had with Pilot, and thus cannot allege how any unidentified breach proximately caused it any actual injury. The alleged withholding of (unidentified) rebates or discounts alone, without some other well-pled additional facts to provide a causal link, is not sufficient to state a RICO claim.

In short, Plaintiff's allegations fail to support "a reasonable inference" that Defendants caused it any cognizable injury. Iqbal, 556 U.S. at 678. It is not reasonable to infer anything from bare allegations and a reference to an affidavit that alleges a purported scheme that does not mention Plaintiff.

6. The Complaint Also Fails To State A RICO Conspiracy Claim

Plaintiff also fails to state a RICO conspiracy claim. In order to recover under RICO § 1962(d), Plaintiff must: (i) plead an agreement to commit predicate acts in violation one of RICO's substantive provisions; and (ii) sufficiently allege a violation of one of RICO's substantive provisions. 18 U.S.C. § 1962(d); see also United States v. Symonette, 486 F. App'x 761, 763 (11th Cir. 2012). A complaint must allege that each defendant knowingly agreed to participate in the conspiracy such that "the Complaint should inform each defendant of the nature of his alleged participation in the fraud." Brooks ,116 F.3d at 1381; Jackson v. Bellsouth Telecomm., 372 F.3d 1250, 1263 (11th Cir. 2004) ("[W]hat is required to support a claim of RICO conspiracy is that the plaintiffs allege an illegal agreement to

violate a substantive provision of the RICO statute."). Conclusory allegations of an agreement to violate RICO without factual support are insufficient. Am. Dental, 605 F.3d at 1296 (finding that plaintiffs failed to allege RICO conspiracy "as they merely offered conclusory allegations of agreements…."); Begualg Inv. Mgmt. Inc. v. Four Seasons Hotel Ltd., No. 10-cv-22153, 2011 WL 4434891, at *3 (S.D. Fla. Sept. 23, 2011).

Here, Plaintiff merely alleges that Defendants "conspired with each other within the meaning of 18 U.S.C. § 1962(d) to conduct and/or participate in the business and financial affairs of Pilot Flying J (the RICO enterprise) through a pattern of unlawful racketeering activity in violation of 18 U.S.C. §§ 2, 1341, and 1343." (Complaint at ¶ 67) This recitation of the elements of a RICO conspiracy is insufficient to state a claim. Bryant, 512 F. App'x. at 995; Brooks, 116 F.3d at 1381 (dismissing complaint because it "fails to set forth the time, place, and manner in which any specific predicate act occurred").

Similarly, Plaintiff fails to include any specific allegations regarding the alleged agreement to participate in the alleged conspiracy as against Plaintiff. There is nothing in the Complaint alleging the nature of the agreement, the purported involvement of each Defendant, or how each Defendant, "either by words or actions," manifested a purported agreement to an alleged rebate fraud

scheme directed at Plaintiff. Fahlenbach v. Trans Pac. Capital (USA) Inc., No. 95-civ-8776, 1996 WL 22602, at *6 (S.D.N.Y. Jan 19, 1996). Absent such specific factual allegations, Plaintiff's RICO conspiracy claim fails. American Dental, 605 F.3d at 1296; Jackson, 372 F.3d at 1263.

Plaintiff's inability to demonstrate a RICO "enterprise," as discussed above, also precludes Plaintiff from stating a claim for a RICO conspiracy. See Jackson, 372 F.3d at 1263 ("Essential to any successful RICO claim are the basic requirements of establishing a RICO enterprise…").

B. Plaintiff Fails To State A Fraudulent Misrepresentation Claim

Critically, a fraud claim must be pled with particularity under Rule 9(b). Whitehurst v. Wal-Mart, 306 F. App'x 446, 449 (11th Cir. 2008). To comply with Rule 9(b), the Complaint must set forth: (i) the precise statements made; (ii) the time, place, and person responsible for the statements; (iii) the content and manner in which these statements misled plaintiff; and (iv) what the defendants gained by the alleged fraud. Am. Dental, 605 F.3d at 1291. In other words, "to avoid dismissal, a complaint alleging fraud must plead the 'who, what, when, where and how' of the alleged fraud." Wallace v. SunTrust Mortg., Inc., No. 12-587-CG-B, 2013 WL 5422799, *7 (S.D. Ala. Sep. 26, 2013); Abrams v. CIBA Specialty Chemicals Corp., 08-cv-0068, 2008 WL 4183344, at *6 (S.D. Ala. Sept. 10, 2008)

("The Eleventh Circuit has routinely endorsed dismissal of pleadings that fail to meet these exacting standards.").

Here, Plaintiff's fraudulent misrepresentation claim does not satisfy the particularity requirements of Rule 9(b). The Complaint fails to identify: (1) the alleged misrepresentations made to Plaintiff; (2) the time, place, and person responsible for such alleged misrepresentations; (3) the content and manner in which such statements misled the Plaintiff; and (4) what the Defendants gained by the alleged fraud. Wallace, 2013 WL 5422799 at *7. Instead, as set forth above, the Complaint simply relies on the allegations in the FBI Affidavit, which does not mention Plaintiff at all and makes no allegations whatsoever with respect to any misrepresentations made to Plaintiff, and is therefore insufficient to satisfy the particularity requirements set forth in Rule 9(b).

C. Plaintiff Fails To Plead A Fraudulent Suppression Claim

Plaintiff also fails to state a claim for fraudulent suppression. To state a claim of fraudulent suppression, Plaintiff must allege that: (i) a duty to disclose an existing material fact; (ii) the concealment or suppression of that material fact; (iii) that such concealment or suppression induced Plaintiff to act or refrain from acting; and (iv) Plaintiff suffered actual damage as a proximate result. Coilplus-Ala., Inc. v. Vann, 53 So. 3d 898, 909 (Ala. 2010). A fraudulent suppression claim

must also meet the heightened pleading requirement of Rule 9(b). Peters v. Amoco Oil Co., 57 F. Supp. 2d 1268, 1279-81 (M.D. Ala. 1999).

Here, apart from listing the elements of fraudulent suppression, Plaintiff does not allege that Pilot had any duty to Plaintiff independent of the alleged contract. (See Complaint at ¶109) Similarly, Plaintiff's allegations do not satisfy the particularity requirements of Rule 9(b) because Plaintiff does not allege: (i) the substance of any specific material fact that was allegedly suppressed; (ii) who was involved in the alleged suppression; (iii) where and when the alleged suppression took place; (iv) why the suppression was fraudulent; (v) how the alleged suppression induced Plaintiff to act or refrain from acting, or (vi) that Plaintiff suffered actual damage as a proximate result of the alleged suppression. Consequently, Plaintiff's claim for fraudulent suppression must also be dismissed.

D. Plaintiff Fails To State A Claim For Negligent Misrepresentation

Liability for negligent misrepresentation is "predicated upon the existence of a duty." Legg v. Wyeth, 428 F.3d 1317, 1324 (11th Cir. 2005). As noted above, Plaintiff does not allege that Defendants owed it any non-contractual obligations. Accordingly, Plaintiff fails to state a claim for negligent misrepresentation. Moreover, for the same reasons that Plaintiff failed to satisfy the heightened pleading requirements of Rule 9(b) as to its fraudulent misrepresentation claim,

Plaintiff has not adequately pled a claim for negligent misrepresentation. Abrams, 2008 WL 4183344, at *8 (dismissing negligent misrepresentation claim where plaintiff failed to allege cause of action with particularity).

E. Plaintiff Fails To State A Breach Of Contract Claim

Plaintiff's breach of contract claim must be dismissed because it does not identify any specific contract terms that were allegedly breached. A claim for breach of contract requires Plaintiff to allege the existence and relevant terms of the contract. See, e.g., Ala. Aircraft Indus., Inc. v. Boeing Co., Inc., 2:11-CV-3577-RDP, 2013 WL 1178720, *12 (N.D. Ala. Mar. 20, 2013); Northampton Rest. Grp., Inc. v. FirstMerit Bank, N.A., 492 F. App'x 518, 522 (6th Cir. 2012) ("[i]t is a basic tenet of contract law that a party can only advance a claim of breach of written contract by identifying and presenting the actual terms of the contract allegedly breached").

The Alabama Aircraft case is instructive. In dismissing a breach of contract claim, the court noted that "[d]espite the fact that this is a breach of contract claim, no contractual term which was allegedly breached is set forth." 2013 WL 1178720 at *12. Instead, the plaintiff had merely alleged that the defendant had an obligation under the contract, and that he breached it. Id. The court concluded that the plaintiff "utterly fail[ed] to cite any contractual provision whatsoever that

purports to require Defendants" to do what the plaintiff alleged Defendants failed to do, and therefore plaintiff failed to state a claim for breach of contract. Id.; see also Adkins v. Cagle Foods JV, LLC, 411 F.3d 1320, 1327 (11th Cir. 2005) (dismissing breach of contract claim because plaintiffs did not identify any contractual provision breached by defendant); see also Whitney Nat'l Bank v. SDC Cmtys., Inc., 8:09-cv-1788, 2010 WL 1270264 (M.D. Fla. Apr. 1, 2010) (dismissing complaint where plaintiff failed to allege the specific provision of the contract allegedly breached).

Here, Plaintiff alleges only that it was "a party to a fuel rebate and/or discount contract with Pilot Flying J between approximately 2005 and the present day." (Complaint at ¶ 23) Plaintiff does not identify the rebate "and/or" discount contract it had with Pilot, and it fails to identify the particular terms of any agreement allegedly breached. Consequently, Plaintiff's breach of contract claim should be dismissed.

F. Plaintiff Fails To Plead A Deceptive Trade Practices Claim

Plaintiff's claims under the various states' deceptive trade practices statutes are legally deficient and should be dismissed on several grounds.

First, Plaintiff lacks standing to assert any claim under Alabama's Deceptive Trade Practices Act ("DTPA"). As a threshold matter, Plaintiff failed to make a

pre-litigation demand for relief as required by § 8-19-10(e) of the DTPA. ALA. CODE § 8-19-10(e) ("At least 15 days prior to the filing of any action under this section, a written demand for relief, identifying the claimant and reasonably describing the unfair or deceptive act or practice relied upon and the injury suffered, shall be communicated to any prospective respondent…"). Failure to satisfy this requirement requires dismissal of Plaintiff's claim. Givens v. Rent-A-Center, Inc., 720 F. Supp. 160, 162 (S.D. Ala. 1988) (dismissing plaintiff's DTPA claims because "plaintiff failed to communicate to defendants a written demand for relief, as required by § 8-19-10(e)"); Deerman v. Fed. Home Loan Mortg. Corp. 955 F. Supp. 1393, 1399-1400 (N.D. Ala. 1997) (same).

Plaintiff's DTPA claims must also be dismissed because the DTPA only provides a private right of action for "consumers." Deerman, 955 F. Supp. at 1399 ("Only 'consumers' have private rights of action under [the DTPA]."). A "consumer" is defined as "[a]ny natural person who buys goods or services for personal, family or household use." ALA. CODE § 8-19-3(2). Not only is Plaintiff a corporation and thus not a "natural person," Plaintiff purchased fuel from Pilot for commercial trucking use and not "for personal, family or household use." Accordingly, Plaintiff does not have standing to state a cause of action under the DTPA and this claim must be dismissed. See In re Bextra & Celebrex Mktg. Sales

Prac. & Prod. Liab. Litig., 495 F. Supp. 2d 1027, 1036 (N.D. Cal. 2007) (dismissing plaintiffs' Alabama DTPA claims because the plaintiffs did not purchase the goods for "personal, family or household use").

Second, causes of action under the DTPA are mutually exclusive with claims for common law fraud, misrepresentation, and suppression. ALA. CODE § 8-19-15(a). The DTPA explicitly provides that "[a]n election to pursue the civil remedies available at common law…for fraud, misrepresentation, deceit, suppression of material facts or fraudulent concealment…shall exclude and be a surrender of all rights and remedies available under this chapter." ALA. CODE § 8-19-15(b). As Plaintiff here has elected "to pursue the civil remedies available at common law" for fraudulent misrepresentation (Count VI) and fraudulent suppression (Count VIII), Plaintiff's claim under the DTPA is barred. See, e.g. Nimbus Techs., Inc. v. SunnData Prods., Inc., No 04-cv-00312, 2005 WL 6133373, at *21 (N.D. Ala. Dec. 7, 2005) (dismissing plaintiff's DTPA claim because plaintiff "conceded that it procedurally waived its right to pursue a claim under the [DTPA] by pursuing common law causes of action and remedies in this case").[8]

[8] Plaintiff's attempt to assert a DTPA claim on behalf of a class is also legally deficient. The DTPA provides a cause of action only on an individual basis, not on a class basis. The statute

Finally, Plaintiff's claims under the other states' (and the District of Columbia's) deceptive trade practices statutes are similarly defective. Plaintiff has not pled a sufficient basis for standing to sue under any of the other statutes. Among other things, Plaintiff is not entitled to seek relief under the laws of states in which it did not suffer an injury. See, e.g., In re Packaged Ice Antitrust Litig., 779 F. Supp. 2d 642, 657-58 (E.D. Mich. 2011) ("[N]amed plaintiffs lack standing to assert claims under the laws of the states in which they do not reside or in which they suffered no injury.").[9] Here, Plaintiff is a resident of Alabama and only alleges conduct occurring in Alabama and therefore has no standing to bring

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explicitly reads: "[a] consumer or other person bringing an action under this chapter may not bring an action on behalf of a class." ALA. CODE § 8-19-10(f); see also Ex parte Exxon Corp., 725 So. 2d. 930, 933 (Ala. 1998) ("Alabama law does not allow consumers to bring class actions based on deceptive trade practices.").

[9] See also Cornelius v. Fidelity Nat'l Title Co., No. 08–754, 2009 WL 596585 at *9 (D.Wash. March 9, 2009) (holding that plaintiffs who did not allege that they suffered any injury under other state's consumer protection statutes did not state claim and did not have standing to represent any unnamed out-of-state plaintiffs); In re Actimmune Marketing Litig., No. 08–02376, 2009 WL 3740648 at *17 (N.D. Cal. Nov. 6, 2009) (dismissing plaintiffs' claims brought under the consumer protection statutes in states where they did not reside); Nw. Mortg., Inc. v. Superior Court, 72 Cal. App. 4th 214, 85 Cal. Rptr. 2d 18 (1999) (California deceptive trade practice act does not extend to non-California residents and noting that state consumer protection statutes generally do not apply to claims arising solely from extraterritorial conduct); In re Wellbutrin XL Antitrust Litig., 260 F.R.D. 143, 158 (E.D. Penn. 2009) (holding that plaintiff failed to allege standing under several states' consumer protection statutes where plaintiff was not located in the relevant states and did not allege it suffered any injury).

claims under the laws of any other state.[10] Id. In addition, Plaintiff has failed to adequately plead any entitlement to relief under any of the states' deceptive trade practices statutes, including by failing to adequately plead, inter alia, that it is a "consumer" entitled to seek relief under any of the statutes, that is purchased goods or services for non-commercial use that are subject to such statutes, or that it suffered any injury as a result of Defendants' conduct in violation of such statutes.

G. Plaintiff's Unjust Enrichment Claim Is Barred

As this Court has recognized, "Alabama law is clear that quasi-contractual, equitable remedies such as unjust enrichment are not cognizable in the presence of an express contract between the parties that governs the same subject matter." Branch Banking & Trust Co. v. Howard, No. 12-0175, 2013 WL 951652, *5 (S.D. Ala. Mar. 8, 2013); see also Kennedy v. Polar–BEK & Baker Wildwood P'ship, 682 So.2d 443, 447 (Ala. 1996) ("This Court has recognized that where an express contract exists between two parties, the law generally will not recognize an implied contract regarding the same subject matter."); Gould v. Transamerica Life Ins. Co., No. 11-0730, 2012 WL 512667, *3 (S.D. Ala. Feb. 15, 2012) ("[I]t is not possible to have a viable unjust enrichment claim when there is an express contract as to the

[10] Even with the class allegations, Plaintiff's claims under all state's deceptive trade practices acts must fail because, as explained below infra at Part II, a named plaintiff cannot bring claims on behalf of a class that it does not have individually.

same subject matter"); White v. Microsoft Corp., 454 F. Supp. 2d 1118, 1132–33 (S.D. Ala. 2006).

Here, the alleged misconduct stems from a purported failure by Defendants to abide by certain (unidentified) terms of a contract with Plaintiff. Plaintiff does not allege that Defendants owed it any right or benefit distinct and separate from such contractual relationship. Consequently, Plaintiff cannot state a claim for unjust enrichment, as plaintiff has an adequate remedy at law. See Howard, 2013 WL 951652 at *6; N. Assurance Co. of Am. v. Bayside Marine Constr., Inc., No. 08-222-KD-D, 2009 WL 151023, at *4 (S.D. Ala. Jan. 21, 2009) ("In Alabama, the doctrine of unjust enrichment is an equitable remedy which issues only where there is no adequate remedy at law.").

II. PLAINTIFF LACKS STANDING TO ASSERT ANY CLAIMS ON BEHALF OF ANY PUTATIVE PLAINTIFF CLASS

As set forth herein, Plaintiff has failed to state any viable claims against Defendants. Consequently, this Complaint should be dismissed notwithstanding Plaintiff's attempt to bring such claims on behalf of a class. It is well established that a named plaintiff who cannot establish its own cause of action may not seek relief on behalf of other class members. See, e.g., Simonet v. SmithKline Beecham Corp., 506 F. Supp. 2d 77, 81 (D.P.R. 2007) (granting defendant's motion to

dismiss as to a number of plaintiff's claims on behalf of himself and a putative class, before the class certification stage, because plaintiff failed to adequately plead the claims on behalf of himself); see also Pasadena City Bd. of Ed. v. Spangler, 427 U.S. 424, 430 (1976) (fact that plaintiff sought to represent class of unnamed individuals was insufficient to avoid mootness created by the fact that the named plaintiffs had no valid claims).

Indeed, at the motion to dismiss stage, before class certification is considered, "the court must dismiss the complaint in its entirety if the named plaintiff has no cause of action in her own right." Simonet, 506 F. Supp. 2d at 81; Shirokov v. Dunlap, Grubb & Weaver, PLLC, No. 10-12043, 2012 WL 1065578, at *33, n. 25 (D. Mass. Mar. 27, 2012) (recommending dismissal of some of plaintiff's claims brought on behalf of himself and a class); Evans v. Taco Bell Corp., 04-CV-103JD, 2005 WL 2333841, at *4 (D.N.H. Sept. 23, 2005) ("[U]nless and until the court certifies such a class, the potential claims of putative class members other than the named plaintiff are simply not before the court.")

In addition, the proposed class here is subject to, and will shortly be barred by, the Global Settlement. On July 16, 2013, the Eastern District of Arkansas preliminarily approved the Global Settlement, and the Fairness Hearing for final approval of the Global Settlement is scheduled for November 25, 2013. Once

finally approved, the Global Settlement will cover a class defined as:

> All persons and entities in the United States who purchased over the road diesel fuel for commercial use in Class 7 and Class 8 vehicles…from Defendants Pilot Corporation and Pilot Travel Centers LLC d/b/a Pilot Flying J pursuant to a diesel fuel rebate program or discount program (which rebate or discount program is defined as a cost-plus and/or retail-minus discount program (not to include discounts for payments made by cash, check, or major credit card at point of sale)), or both, from January 1, 2005 to July 15, 2013…

See Global Settlement at p. 3.

CONCLUSION

For all of the foregoing reasons, Defendants respectfully request that this Court dismiss the Complaint with prejudice, and issue such other relief as this Court deems just and appropriate.

Dated: October 28, 2013

Respectfully submitted,

By: */s/ M. Christian King*

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CERTIFICATE OF SERVICE

I hereby certify that on this 28th day of October, 2013, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following:

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